Filed 8/23/16 Glage v. RGW Construction CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THOMAS A. GLAGE, Plaintiff and Appellant, v. RGW CONSTRUCTION, INC., et al., Defendants and Respondents.	H040469 (Santa Clara County Super. Ct. No. 111CV194584)

On a dark night on December 16, 2009, Thomas A. Glage was driving home from a dinner event at the Gilroy Elks Lodge (Lodge). As he made a left turn from the driveway of the Lodge onto Highway 152 (eastbound), he was struck by vehicle proceeding westbound. Glage claimed that before making the turn, he had stopped twice to look for oncoming traffic, and because he saw nothing other than a distant vehicle proceeding *eastbound*, he believed it was safe to proceed.

Glage filed a lawsuit against the California Department of Transportation (Caltrans), and RGW Construction, Inc. (RGW). He alleged that his accident was caused by a construction project that was carried out in a manner that created a dangerous condition that obscured his vision of westbound traffic on Highway 152. Caltrans and RGW (collectively, defendants) moved successfully for summary judgment on the ground that Glage could present no evidence that defendants were responsible for the creation of a dangerous condition that caused the accident.

On appeal, Glage claims that "the trial court erred in weighing the evidence" in granting summary judgment. Glage argues that he presented evidence from which it could be reasonably inferred that there was a dangerous condition, namely, an obstruction to his vision of cross-traffic on Highway 152, that caused his accident. We conclude that the court properly granted summary judgment, and we will therefore affirm the presumed judgment entered on the summary judgment order.

PROCEDURAL BACKGROUND

On February 17, 2011, Glage filed a complaint for personal injuries and property damage against RGW and Caltrans. On or about August 30, 2011, Glage filed a first amended complaint (Complaint), alleging two causes of action: (1) for general negligence against RGW;[1] and (2) for damages against Caltrans resulting from a dangerous condition existing on public property, namely, a road construction project that resulted in the placement of obstructions eliminating motorists' line of sight at or near the intersection of the Lodge driveway and Highway 152.

In June 2013, defendants jointly moved for summary judgment, or, in the alternative, for summary adjudication, pursuant to Code of Civil Procedure section 437c.[2] Glage opposed the motion. Defendants filed a reply, including objections to evidence submitted by Glage. After a hearing on October 8, 2013, the court entered a written order that same date granting defendants' motion for summary judgment (Order). The court concluded that (1) defendants met their initial burden of showing there was no evidence

[1] Glage alleged in the general negligence cause of action attachment to the Complaint that the claim was being asserted against RGW and Caltrans. But defendants noted in their motion for summary judgment that the first cause of action for negligence was directed against RGW only, and Glage did not (either in opposing the motion or in this appeal) refute this contention. We therefore treat the negligence claim in the Complaint as having been asserted against RGW only.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

of the existence of, or that they created, a dangerous condition at the accident scene, and (2) Glage "fail[ed] to provide nonspeculative evidence that demonstrate[d] the existence of a triable issue of material fact." On October 10, 2013, defendants' counsel served a document captioned "notice of entry of judgment or order" (capitalization omitted), attaching a copy of the Order. Glage filed a timely appeal.

DISCUSSION

I. Appealability

Glage stated in his notice that the appeal was from the "[j]udgment after order granting a summary judgment motion," and he referenced a judgment or order of October 8, 2013, which was apparently the Order. But the record fails to disclose that a judgment was thereafter entered on the Order. An order granting summary judgment is not appealable. (§ 437c, subd. (m)(1); see *Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030.)

Defendants have not raised a challenge to Glage's appeal on the ground that it is from a nonappealable order. But irrespective of whether an appealability challenge is raised, "[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1. [Citations.]" (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126-127.)

Here, the appeal is from the nonappealable summary judgment Order. But we acknowledge that we may invoke our power to save the appeal under two distinct circumstances: (1) where a judgment is later entered on the summary judgment order, we may construe the notice as an appeal from the judgment (*Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 288); and (2) where no judgment is entered, we may deem the summary judgment order to incorporate a judgment and

thereby treat the appeal as one taken from the judgment (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762, fn. 7 (*Levy*)).

The record does not disclose that a judgment was entered on the Order at some date after October 10, 2013. But we will treat the appeal as having been taken from the "deemed" judgment entered on the summary judgment Order (*Levy*, *supra*, 108 Cal.App.4th at p. 762, fn. 7), and we will consider the merits of the appeal in the interests of justice and to avoid delay.

II. The Summary Judgment Order

A. Summary Judgment Motions Generally

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As such, the summary judgment statute, section 437c, "provides a particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.)

Summary judgment is appropriate where "the action has no merit or that there is no defense to the action or proceeding." (§ 437c, subd. (a)(1).) The moving party must through its separate statement identify each of the material facts it contends are undisputed and specifically refer to the supporting evidence. (§ 437c, subd. (b)(1).) "The materiality of a disputed fact is measured by the pleadings." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250 (*Conroy*); see also *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.)

The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must "show[ ] that one or more elements of the cause of action . . . cannot be established

[by the plaintiff], or that there is a complete defense to that cause of action." (§ 437c, subd. (p)(2); see also *Aguilar*, at p. 853.) The defendant " 'need not support his [or her] motion with affirmative evidence negating an essential element of the responding party's case. Instead, the moving defendant may . . . point to the absence of evidence to support the plaintiff's case.' " (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780 (*Saelzler*).) A moving defendant may meet this burden of showing, under section 437c, subdivision (p)(2), that one or more elements of the plaintiff's claim "cannot be established" by, for instance, presenting (1) undisputed facts that "prove the contrary of the plaintiff's allegations as a matter of law" (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1597); (2) evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he [or she] has discovered nothing" (*Aguilar*, at p. 855, fn. omitted); (3) admissions in the plaintiff's own discovery responses that disprove an essential element of its claim (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749); or (4) the plaintiff's "factually devoid discovery responses" from which it can be inferred that the plaintiff cannot establish one or more elements of its claim (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590). And when the summary judgment motion is based upon an affirmative defense, " 'the defendant has the initial burden to show that undisputed facts support *each element* of the affirmative defense.' [Citations.]" (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289.)

If the moving defendant meets its burden of showing evidence "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action . . . the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . shall not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action

or a defense thereto." (§ 437c, subd. (p)(2); see *Aguilar*, *supra*, 25 Cal.4th at p. 849.) And the evidence submitted, as is the case with the moving party's evidence, must be admissible. "[A] party 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145 (*Dollinger DeAnza*).)

B. Standard of Review

Since summary judgment motions involve pure questions of law, we review independently the granting of summary judgment to ascertain whether there is a triable issue of material fact justifying reinstatement of the action. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) In doing so, we "consider[] all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*).)

In our independent review of the granting of summary judgment, we conduct the same three-step procedure employed by the trial court. First, "we identify the issues framed by the pleadings because the court's sole function on a motion for summary judgment is to determine whether there is a 'triable issue as to any material fact' (§ 437c, subd. (c)), and to be 'material' a fact must relate to some claim or defense *in issue* under the pleadings. [Citation.]" (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926.) Second, we examine the motion to determine whether it establishes facts justifying judgment in the moving party's favor. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) Third, we scrutinize the opposition—assuming movant has met its initial burden—to "decide whether the opposing party has demonstrated the existence of a triable, material fact issue [to defeat summary judgment]. [Citation.]" (*Ibid.*; see also *Burroughs v. Precision Airmotive Corp.* (2000) 78 Cal.App.4th 681, 688.) We need not defer to the trial court, and we are not bound by the reasons in its summary judgment ruling; we

review the ruling of the trial court, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

We review a trial court's rulings on evidentiary objections in connection with a summary judgment motion de novo—the same standard applicable to the review of a summary judgment order itself. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1450-1452 (*Pipitone*); cf. *Shugart v. Regents of University of Cal.* (2011) 199 Cal.App.4th 499, 505 (*Shugart*) [evidentiary rulings on summary judgment reviewed for abuse of discretion].) As we noted in *Pipitone*, although the California Supreme Court has not definitively identified the proper of review, our high court has suggested a de novo standard by observing: " 'Because summary judgment is decided entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on questions of evidence. Nor is the trial court often, if ever, in a better position than a reviewing court to weigh the discretionary factors.' " (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.)

In an appeal from an order of summary judgment, the appellant bears the burden of demonstrating error, irrespective of whether he or she bore the burden in the trial court. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1140.) Although our review of the summary judgment is de novo, it " 'is limited to issues which have been adequately raised and briefed.' [Citation.]" (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.)

C. Defendants' Summary Judgment Motion

1. Defendants' Moving Papers

Defendants presented evidence in their motion that on the evening of December 16, 2009,[3] on a dark night, Glage was driving his 2005 pickup truck, leaving the Lodge after attending a dinner function. As he exited, Glage stopped his truck approximately 10

[3] Hereafter, all dates are 2009 unless otherwise specified.

feet from the fog line of westbound Highway 152; he looked right and left and saw no oncoming traffic in either direction. He then pulled his truck closer to the intersection and stopped approximately three feet from the fog line. Glage looked to his left and saw no oncoming traffic, and he looked right and saw headlights from an oncoming vehicle approximately 900 feet away. He then proceeded to make a left turn onto Highway 152, intending to travel eastbound towards home. When he was approximately three to four feet into the westbound lane of Highway 152, he was struck by a pickup truck being driven by Miguel Lopez. At the accident scene, Glage told Gilroy Police Officer Randall Bentson: "I saw the truck but felt [I] had time to make the turn." But in making this statement to Officer Bentson, Glage indicated that this truck was proceeding *eastbound*, not westbound as was the Lopez truck that collided with Glage.

Glage indicated in his discovery responses that there were no photographs or other evidence obtained on the night of the accident that depicted any visual obstructions of oncoming westbound traffic at the intersection between the Lodge driveway and Highway 152. Glage testified in deposition that he could not be sure whether there were any obstructions to his view of westbound traffic at the time of the accident. He responded to the question of whether there was something blocking his vision: "It was dark. All I can say is it was dark."

2. Glage's Opposition

Glage's opposition consisted of an opposing brief and a response to defendants' separate statement. His evidence consisted of his own declaration and the declaration of his son, John Glage (John).

Glage stated in his declaration that after finishing a dinner meeting at the Lodge at approximately 8:00 p.m. on December 16, he drove his pickup truck down the driveway from the hilltop facility, approaching Highway 152. The evening was " 'pitch black.' " Based upon his prior visits to the Lodge, he was aware that there was ongoing construction in the area, including disruption of the ground on the north side of the

highway and the presence of concrete barriers and construction supplies on either side of the Lodge's driveway. Glage described the manner in which he twice stopped approximately 10 feet and three feet from the intersection and looked both ways as referenced in defendants' motion. During the second stop, he saw a single set of headlights on his right (approaching eastbound) that he estimated to be approximately 900 feet away, and he concluded that he had "plenty of time to proceed forward into [the] left hand turn that would have [him] going eastbound."

Glage declared that as he began to travel forward in the westbound lane on Highway 152, "all of a sudden everything went 'blank.' " He believes that he lost consciousness briefly upon impact. His front airbags deployed, and he was later told that his truck was struck in the left front area and he was spun clockwise "essentially 360°" and came to rest near the centerline but mostly in the westbound lane. Glage indicated he had no recollection of having spoken with Gilroy police officers at the scene.

D. Objections to Glage's Evidence

Glage presented evidence—in his own declaration and in the declaration of his son, John—that concerned the condition of the accident scene on December 20, four days after the accident. This evidence, as well as other aspects of the two declarations, was the subject of multiple objections by defendants that were sustained by the court.

As we noted above, the appellate court reviewing a summary judgment order considers only admissible evidence submitted in support of and in opposition to the motion. (*Merrill, supra*, 26 Cal.4th at p. 476; *Dollinger DeAnza, supra*, 199 Cal.App.4th at pp. 1144-1145.) We therefore address initially whether the court properly sustained defendants' objections to Glage's evidence, since this determination informs our ultimate review of the propriety of the order granting summary judgment.

1. Evidence, Objections, and Rulings

Glage declared that after he was released from the hospital on December 20 (four days after the accident), his son, John, drove him to the accident site in John's vehicle.

John drove up the hill to the Lodge facility and then drove down the driveway and stopped approximately 10 feet from the north edge of Highway 152. Glage immediately saw "a complete obstruction of [his vision of] the westbound roadway" of Highway 152, and John told Glage "it was obvious that [Glage] had not been able to see vehicles[,] much less headlights[,] due to the obstructions to the left roadside/driveway side due to accumulated construction materials, debris and concrete barriers known as k-rails." Glage then instructed John to drive to approximately three feet from the north edge of Highway 152. Glage "saw and [John] remarked that a driver in that position had no line of sight of westbound traffic approaching from Gilroy and traveling towards Hecker Pass (to the west) [due to roadway obstructions]."

Glage also declared that after the accident, he learned that obstructions on Highway 152 "had been the source of complaints by other [Lodge] members and visitors at the [Lodge] and had warranted reported complaints to Cal[t]rans to remedy the problems even before [Glage's] accident." Glage attached to his declaration two photographs depicting the area where the Lodge driveway intersected with Highway 152 that were taken in the daytime; he indicated that they depicted the scene "as it existed immediately prior to the accident and as it existed on Sunday, December 20, 2009."

John's declaration includes a description of the visit to the accident site on December 20 and observations of the conditions at the site that were similar to those contained in his father's declaration. John also declared that he reviewed the two photographs attached to Glage's declaration and that they accurately represented the scene as it existed on December 20.

Defendants filed multiple written objections to the evidence in the two declarations. As it pertained to the recital of the events and observations of Glage and John from their December 20 visit to the accident scene, defendants' objections included: lack of foundation, lack of authentication, no personal knowledge, hearsay, speculation, and prejudicial and misleading testimony. Defendants also objected to the declarants'

opinions that the construction materials obstructed motorists' line of sight on the basis that it constituted expert opinion by witnesses without proper foundation. Defendants further objected to Glage's declaration insofar as he stated what he was told by other Lodge members and visitors and regarding complaints made to Caltrans, on the grounds of lack of foundation, no personal knowledge, lack of authentication, hearsay, speculation, and prejudicial and misleading testimony. Lastly, defendants objected to the two photographs of the scene attached to Glage's declaration and to Glage's statement that they represented the condition of the accident scene immediately prior to the accident and on December 20, on the following grounds: lack of foundation, lack of authentication, no personal knowledge, hearsay, speculation, and prejudicial and misleading testimony. Defendants also noted that Glage had failed to disclose that the photographs had been taken by his counsel in the first week of February 2010, not contemporaneously with his postaccident site visit on December 20, 2009 as implied in the declaration.

In its order granting summary judgment, the court sustained 13 of defendants' 17 objections to evidence, indicating that "[t]he remaining objections [were] not the basis for the Court's ruling." The court did not state the specific grounds upon which it sustained the evidentiary objections.

2. No Error in Sustaining Evidentiary Objections

On appeal, Glage does not specifically address the propriety of the trial court's rulings on defendants' evidentiary objections. Instead, he simply launches into a discussion of the evidence he presented in opposing the motion, including extensive reliance upon the December 20 visit to the accident scene and the photographs of the scene taken two months after the accident. There is authority to support the view that Glage's failure to argue on appeal that the trial court's evidentiary rulings were incorrect results in his forfeiture of that challenge, allowing this court to deem his evidence properly excluded. (See, e.g., *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202

Cal.App.4th 35, 41; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181.) But as we have explained, "it is not the role of the appellate court to 'grant conclusive effect to the trial court's treatment of the evidence before it, however patently erroneous that treatment may be.' [Citation.] Quite the opposite: 'if a party's position depends on . . . inadmissible evidence admitted over a proper objection,' or conversely if a party was prejudiced by the exclusion of admissible evidence, 'a reviewing court would be empowered, and indeed obliged, to acknowledge the error' and review the evidence. [Citation.] . . . [¶] We therefore do not accept the argument that because [appellant] failed to expressly challenge the trial court's evidentiary rulings excluding [evidence he proffered], we must defer to those rulings without considering whether the trial court's exclusion of potentially material evidence was proper." (*Pipitone, supra*, 244 Cal.App.4th at pp. 1451-1452, quoting *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711.) Therefore—without endorsing Glage's material omission of essential arguments to support the appeal—we follow our approach in *Pipitone* and will consider the propriety of the trial court's evidentiary rulings here.

The evidence submitted through the declarations of Glage and his son consisted of their observations of the accident scene during the day made four days after the accident, including their opinions that on the night of December 16, Glage's line of sight in ascertaining whether there was westbound traffic on Highway 152 was obstructed. There was no evidence establishing that the conditions of the accident site on December 20 were the same four days earlier. In fact, there was no competent evidence that there were any physical obstructions to Glage's line of sight on the night of the accident. To the contrary, Glage presented no photographs or other evidence obtained on the night of the accident depicting any visual obstructions to oncoming westbound traffic at the intersection of the Lodge driveway and Highway 152, and Glage's deposition testimony did not confirm that there were any such obstructions. Glage's opposition evidence was nothing more than speculation that, because construction materials existed by the side of

the road on December 20 that impaired the view of Glage (apparently in the passenger's seat) and of his son (in the driver's seat) of approaching westbound traffic while driving John's vehicle at the driveway/Highway 152 intersection, those same conditions existed four days earlier and they would have created a visual impairment to *Glage* in driving *his own* vehicle.

"A party cannot avoid summary judgment based on mere speculation and conjecture [citation], but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524; see also *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Thus, for instance, a plaintiff's evidence opposing summary judgment purportedly showing damages as a result of a negative reaction by the stock market and a loss of customers was held insufficient as speculative, where the plaintiff offered no expert testimony or other evidence specifically supporting the claims. (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 15-16.) Likewise, where the defendant (a religious society) denied knowledge that a priest had sexually abused the plaintiff during a particular period of time, the plaintiff's evidence casting doubt upon the completeness of the defendant's records was held insufficient to defeat summary judgment, since the court would have been required to speculate that the incomplete records evidenced the defendant's knowledge. (*Doe v. Salesian Soc.* (2008) 159 Cal.App.4th 474, 481.)

"A lay witness may express an opinion based on his or her perception, but only where helpful to a clear understanding of the witness's testimony (Evid. Code, § 800, subd. (b)), 'i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed.' [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 889 (*Hinton*).) And a lay witness's opinion must be rationally based on the perception of the witness. (Evid. Code § 800, subd. (a).)

Here, the court properly sustained the objections to the two declarations offering opinions concerning the accident. The Glage opinion that the conditions at the accident

site on December 20 demonstrated that there were line-of sight obstructions to his ability to view westbound traffic on Highway 152 four days earlier was improper. The Glage opinion lacked proper foundation. Even if it were appropriate for Glage, a lay witness, to offer opinion evidence concerning roadway obstructions, the purported basis for the opinion is entirely speculative. "An expert's speculations do not rise to the status of contradictory evidence, and a court is not bound by expert opinion that is speculative or conjectural. [Citations.] Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning." (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106; see also *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 52 [exclusion of the plaintiff's lay opinion about origin of hay bale involved in her fall based upon its color and other characteristics properly excluded where "her opinions about the appearance of hay bales [lacked] any rational basis"].) The purported foundation of Glage's opinions concerning the claimed line-of-sight obstruction on the night of the accident—his observations of the accident site four days later—was entirely speculative.

The opinions offered by John in his declaration were excludable because the evidence was improper lay opinion testimony. His lay opinion that his line of sight of westbound traffic was obstructed while driving his vehicle at the driveway/Highway 152 intersection on December 20 was not relevant to the question of whether Glage's line of sight while driving his vehicle was obstructed four days earlier. The opinions also lacked foundation. Moreover, to the extent that John was offering testimony as to road conditions on the night of the accident on December 16, it was improper because he had no personal knowledge to support it: there is nothing in the record indicating he was present at the accident scene any time on December 16. (See Evid. Code, § 702, subd. (a).)

The statements in Glage's declaration that after the accident, he learned that Lodge members and visitors had complained about obstructions on Highway 152 were likewise

inadmissible. This evidence was plainly hearsay: out-of-court statements made by unidentified persons concerning the condition of the highway that were offered by Glage for the truth of the matters stated. (See Evid. Code, § 1200, subd. (a).) Glage having presented no recognizable exception to the hearsay rule, this evidence was properly excluded.

Lastly, the two photographs—as well as Glage's statements as to their purported depiction of the condition of the accident site as of December 16—were properly excluded. First, Glage did not properly authenticate the photographs attached to his deposition. (See Evid. Code, § 1400.) Glage states simply that the photographs were "of the Gilroy Elks driveway as the driveway approaches/adjoins [Highway] 152." Although to authenticate a photograph, the person offering it need not necessarily have been the one who took it (*People v. Goldsmith* (2014) 59 Cal.4th 258, 268), Glage failed to (1) identify when or by whom the photographs were taken, or (2) verify that the photographs accurately depicted the scene as it existed at the relevant time. Second, and more significantly, defendants submitted reply evidence that the photographs were taken by Glage's counsel in early February 2010, a fact admitted by Glage on appeal. To the extent Glage offered the photographs in support of his statement that they depicted the accident scene "as it existed immediately prior to the accident and as it existed on Sunday, December 20, 2009," the evidence was incompetent. It was nothing more than speculative evidence that, even if the photographs accurately depicted the site conditions on December 20, they accurately depicted the site conditions four days earlier when the accident occurred. (See *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1537 [employee's evidence opposing summary judgment consisted of "nothing more than rank speculation" of bias].)

Based upon our independent review of the matter (see *Pipitone*, *supra*, 244 Cal.App.4th at pp. 1450-1452), we conclude that the evidentiary objections were properly sustained. But even if we were to apply the standard of review that some courts deem to

be appropriate (see, e.g., *Shugart, supra*, 199 Cal.App.4th at p. 505), we would conclude that the trial court did not abuse its discretion by sustaining defendants' evidentiary objections.

E. Summary Judgment Was Properly Granted

1. Negligence Claim

The elements of a negligence claim that must be established by a plaintiff are duty, breach, causation, and damages. (*Conroy*, *supra*, 45 Cal.4th at p. 1250.) Although the question whether a defendant was negligent is generally a question of fact for the jury, in situations "where reasonable jurors could draw only one conclusion from the evidence presented, lack of negligence may be determined as a matter of law, and summary judgment [may be] granted. [Citation.]" (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214 (*Federico*); see also *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1000.) In establishing actual causation, the plaintiff asserting a negligence claim must show that the defendant's act or omission was a substantial factor in bringing about the injury. (*Saelzler*, *supra*, 25 Cal.4th at p. 778.) Thus, if the defendant demonstrates in its motion for summary judgment, through the evidence adduced in the case, that the plaintiff cannot reasonably expect to establish a prima facie case of causation, and that a prospective nonsuit motion by the defendant would inevitably be granted, "the trial court [would be] justified in awarding summary judgment to avoid a useless trial." (*Id.* at p. 768; see also *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752.)

Glage alleged that on December 16, "defendants . . . carelessly and negligently maintained their construction area at [the Lodge driveway/Highway 152] intersection in such a manner as to block [Glage's] view," and that as a proximate result of this negligence, Glage was damaged. Glage presented evidence that he was damaged, and we can assume—in considering the issues in this appeal—that he did or readily could establish legal duty. But he offered no admissible evidence establishing the elements of

negligence or causation. Defendants in their motion showed, among other things, that Glage (1) was driving his truck on a dark night traveling downhill on the Lodge driveway to the intersection of Highway 152; (2) stopped twice at the bottom of the hill, looking both ways for cross-traffic on Highway 152; (3) saw no vehicles traveling westbound and only one distant vehicle traveling eastbound that did not pose a problem for his turn; (4) testified in deposition that he could not be certain whether there were any obstructions to his view of westbound traffic; and (5) had no photographs or other evidence from the night of the accident that depicted any such visual obstructions. As discussed (see pt. II.D.2., *ante*), Glage's evidence submitted in opposition to the motion concerning purported line-of-sight obstructions at the accident scene was inadmissible and objections to such evidence were properly sustained. That being the case, Glage presented no evidence that defendants negligently maintained the area at the driveway/Highway 152 intersection, or that defendants did anything that caused Glage's damages. Given this failure of proof of these two elements by Glage, summary adjudication of the negligence claim was proper. (See *Saelzler, supra,* 25 Cal.4th 768; *Federico, supra,* 59 Cal.App.4th at p. 1214.)

2. Dangerous Condition Claim

Public entity liability for injury resulting from a dangerous condition of its property is shown by establishing "(1) a dangerous condition of public property; (2) a foreseeable risk, arising from the dangerous condition, of the kind of injury the plaintiff suffered; (3) actionable conduct in connection with the condition, i.e., either negligence on the part of a public employee in creating it, or failure by the entity to correct it after notice of its existence and dangerousness; (4) a causal relationship between the dangerous condition and the plaintiff's injuries; and (5) compensable damage sustained by the plaintiff." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757-758; see Gov. Code, § 835.) " '[T]he plaintiff has the burden to establish that the condition is one which creates a hazard to persons who foreseeably would use the property with due

care.' " (*Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 559 (*Biscotti*); see also *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384.) "The existence of a dangerous condition ordinarily is a question of fact, but the issue may be resolved as a matter of law if reasonable minds can come to only one conclusion." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133; accord, *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.) In such instances, it is appropriate to grant summary judgment in the defendant's favor. (*Biscotti*, at p. 559; see also *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.)

In the second cause of action of the complaint, Glage alleged that at the time of the accident, Caltrans "maintained, controlled and operated [the Lodge driveway/Highway 152] intersection . . . by allowing there to be placed therein obstructions and barriers that reduced and eliminated line of sight for drivers using said intersection and approaches," and that these obstructions and barriers "constituted a dangerous condition of public property which created a substantial risk of harm to drivers using said roadway." Glage alleged further that Caltrans knew about the dangerous condition and knew or should have known about it sufficiently prior to the accident to have taken corrective measures.

As was the case with the negligence claim, Glage failed to present any admissible evidence supporting multiple elements of the dangerous condition claim. There was no evidence of the existence of a dangerous condition, actionable conduct of Caltrans related to any such condition, or a causal relationship between a dangerous condition and Glage's injuries. Glage's only purported evidence of a dangerous condition—opposition evidence concerning purported line-of-sight obstructions at the scene (four days after the accident)—was inadmissible and objections to such evidence were properly sustained. (See pt. II.D.2., *ante.*) As Glage failed to meet his burden of proof of the existence of a dangerous condition, summary adjudication of the second cause of action in favor of Caltrans was properly granted. (*Biscotti*, *supra*, 158 Cal.App.4th at p. 559.)

DISPOSITION

The presumed judgment entered on the underlying order granting summary judgment is affirmed.

_____
WALSH, J. *

WE CONCUR:

_____
RUSHING, P.J.

_____
PREMO, J.

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.